Supreme Court, U. S.
FILED
MAR 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE and LARRY D. JONES,

Appellees.

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

EVELLE J. YOUNGER,
Attorney General of the State of California.
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.
EDWARD P. O'BRIEN,
Assistant Attorney General.
JOHN T. MURPHY,
Deputy Attorney General.
KARL S. MAYER,
Deputy Attorney General.
THOMAS P. DOVE,
Deputy Attorney General.
6000 State Building,
San Francisco, California 94102.
Telephone: (415) 557-0357.

Attorneys for the State of California as Amicus Curiae.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Subject Index

Page

Interest of the State of California 1

Summary of argument 7

Argument 12

I

A person committed to a state prison upon his conviction of a crime has no property or liberty interest in confinement in a particular institution 12

II

The determination of which institution, correctional or mental health, in which each inmate should be placed is a matter of policy and involves an exercise of judgment 19

III

If the due process clause of the Fourteenth Amendment applies to transfer proceedings between correctional institutions and mental health institutions, only rudimentary procedures are necessary 24

Conclusion 27

Table of Authorities Cited

Cases

	Pages
Board of Regents v. Roth, 408 U.S. 564 (1972)	13, 14, 15, 16
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)	13
Cruz v. Beto, 405 U.S. 319 (1972)	26
Darey v. Sandritter, 355 F.2d 22 (9th Cir. 1965)	22
Gagnon v. Scarpelli, 411 U.S. 778 (1976)	24, 25
Hannah v. Larche, 363 U.S. 420 (1960)	24
Haughey v. Rhay, 300 F.Supp. 490 (D.C.E.D. Wash. 1969)	22
Jones v. North Carolina Prisoners Labor Union, Inc., ... U.S. ....., 97 Sup.Ct. 2532 (1977)	26
Marchesani v. McCune, 531 F.2d 459 (10th Cir. 1976), cert. denied, 429 U.S. 846	15, 19
Matthews v. Eldridge, 424 U.S. 319 (1976)	24
Meachum v. Fano, 427 U.S. 215 (1976)	12, 13, 14, 17, 18, 20, 23, 26
Montanye v. Haymes, 427 U.S. 236 (1976)	13, 17, 18
Moody v. Daggett, 425 U.S. 78 (1976)	14, 16
Morrissey v. Brewer, 411 U.S. 471 (1972)	15, 24, 25
Paul v. Davis, 424 U.S. 693 (1976)	19
Preiser v. Rodriguez, 411 U.S. 475 (1973)	14
Procunier v. Martinez, 416 U.S. 396 (1974)	26
Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.) (en banc), vacated and remanded to consider mootness, 414 U.S. 809 (1973), dismissed as moot, 501 F.2d 992 (5th Cir. 1973)	18
Stiltner v. Rhay, 371 F.2d 420 (9th Cir. 1967), cert. den. 387 U.S. 925, rehrg. den. 389 U.S. 964	22
Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977)	14
Wolff v. McDonnell, 418 U.S. 539 (1974)	15, 16, 19, 20, 24, 25, 26

Codes

California Penal Code:	Pages
Section 2684	2, 3, 4, 17, 22
Section 2685	4
Section 5003	16
Section 5068	16
Section 5080	16

Constitutions

United States Constitution, Tenth Amendment	10, 23
United States Constitution, Fourteenth Amendment	8, 13, 14, 15, 16, 23, 24, 26, 27

Statutes

Civil Rights Act, Title 42, United States Code, Section 1983	7
Nebraska statute, Sections 83-180, Nebraska revised statutes 1943 (reissued 1976)	3

Other Authorities

California Assembly Bill 476, Statutes 1977, Chapter 165, Section 32	3
Inmate Classification Manual of the California Department of Corrections:	
Section 404	4, 5
Sections 1200-1208	4
Section 1201	5
Section 1202	5
Section 1202(A)(1-7), (B)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,
Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE and LARRY D. JONES,
Appellees.

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE STATE OF CALIFORNIA

The appeal questions the decision of a three-judge court of the United States District Court for the District of Nebraska which declared a statute of the State of Nebraska to be unconstitutional as failing to provide a constitutionally convicted felon, who had been sentenced to the Nebraska Department of Correctional Services, due process of law prior to his transfer from a correctional facility, to which he had been asssigned by said Department, to a mental hos-

pital within the Nebraska Department of Public Institutions. Under Nebraska law, involuntary transfer of an inmate from an institution of the Department of Correctional Services to an institution of the Department of Public Institutions upon a determination by one or more psychiatrists or psychologists that the prisoner suffers from a mental disease or defect and cannot be given proper treatment in the correctional facility, is authorized procedure within the operations of the Nebraska correctional system and was treated as such by the courts below as well as on appeal. Accordingly, the issue presented clearly comprehends the question of whether the due process clause applies to an administrative transfer of a mentally ill state prisoner from a state correctional institution to a state mental hospital when confinement in said hospital is within the purview of the sentence imposed upon him.

Approximately twenty thousand persons are incarcerated in California prisons. In each of the last three calendar years, an average of over 125 California inmates were transferred from a California Department of Corrections prison to a California Department of Health mental health facility pursuant to California Penal Code § 2684.[1] Such transfers occur when a determination is made that the inmate has a mental disorder or deficiency and that rehabilitation might be expedited by treatment at one of the state hospitals under the jurisdiction of the Department of Health.

[1]California Penal Code § 2684. The text of Penal Code § 2684 appended to this brief as Appendix A.

Under the Nebraska statute, sections 83-180, Nebraska revised statutes 1943 (reissued 1976), which the three-judge United States District Court found to be unconstitutional, when a physician or psychologist designated by the Director of Correctional Services finds that an inmate suffers from a mental disease or defect, and the physician or psychologist is of the opinion that the prisoner cannot be given proper treatment in a facility of the Department of Correctional Services, the Director may arrange for his transfer for examination, study and treatment to an institution of the Nebraska Department of Public Institutions where proper treatment is available. Persons who are transferred remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the Department when, prior to the expiration of the inmate's sentence, treatment in such a facility is no longer necessary.

Under California Penal Code section 2684 (see Appendix A), as amended by California Assembly Bill 476, Statutes 1977, Chapter 165, § 32, when, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient or insane person confined in a state prison may be expedited by treatment at any of the state hospitals under the jurisdiction of the Department of Health, then the Director of Corrections, with the approval of the Community Release Board (formerly the Adult Authority) shall certify that fact to the Director of Health who shall evaluate the prisoner to determine if he would in fact benefit from care and treatment

in a state hospital. If the Director of Health then so determines, the superintendent of a designated mental health hospital shall receive the prisoner and keep him until such time, in that superintendent's opinion, such person has been treated to an extent that he will not benefit from further care and treatment in a state hospital. Thereafter, pursuant to California Penal Code section 2685 (Appendix A), once it has been determined that the inmate may no longer benefit from treatment in a mental health facility, the inmate shall be returned to the Department of Corrections, with the time he has spent at the state hospital counting as part of the sentence served.

All of the determinations by the Director of Corrections concerning whether an inmate is to be so transferred are made with the benefit of screening procedures undertaken in accordance with the provisions of sections 404, and 1200-1208 of the Inmate Classification Manual of the California Department of Corrections (Appendix B). These procedures are designed to aid and assist the Director of Corrections in the exercise of the discretionary authority granted him by Penal Code section 2684.

Under these California procedures, before an inmate will be considered by the Director for transfer to a hospital of the Department of Health, certain criteria have to be met. A medical finding must be made that the inmate either has a psychiatric condition requiring care and treatment not available in the Department of Corrections, but available in a state hospital, or that he has a deteriorating psychiatric

condition which can be slowed, stabilized or improved by care and treatment at the state hospital. Furthermore, an inmate must be administratively evaluated as controllable within the Department of Health hospital's security system and have a potential for achieving a benefit from his placement therein within approximately six months (Appendix B, § 1201).

The procedure whereby these criteria are reviewed and examined involves an administrative review before an Institutional Classification Committee (Appendix B, §§ 1202, 404), at which time the inmate will have the opportunity to make a personal appearance, whenever feasible, and participate fully in that decision by presenting his own views or submitting documents.

If after this screening review has been made by the Institutional Classification Committee and a recommendation for transfer is made to the Director and approved of by the chief medical officer of the institution involved, then the necessary papers (Appendix B, § 1202(A)(1-7), (B)), copies of which are supplied to the inmate, are routed to the Director, and if the recommendation is approved, to the Community Release Board for its consideration. If the transfer is approved at these levels the documentation is sent to the Director of Health for an independent evaluation as to whether or not the inmate would benefit from the care and treatment proposed in the state hospital facility.

If the Director of Health so determines, then the Director of Corrections transfers the inmate to a

mental health hospital facility where he is retained until he will no longer benefit from further care and treatment in such hospital. However, as in the Nebraska provisions, California transfers from Corrections to Mental Health cannot extend the inmate's total period of custody.

While the California system may involve more features than are demonstrated on the record before this Court with regard to the Nebraska system, the outcome of this case could have an immediate effect upon the California transfer process. A determination by this Court upholding the decision of the three-judge court below that due process applies to these transfers could affect California in several important ways. First, the validity of several hundred such transfers could become clouded. Second, if the decision below is upheld, California would be required to rewrite its statutory provisions and change its practices to meet the rigid procedural requirements set forth in the judgment of the three-judge district court.

Third, the range within which the executive and the legislature are able to fashion correctional and mental health policy and procedures in California, adjusting methods to fit determinations as to the proper exercise of correctional and mental health discretion, could well be restricted by a decision upholding the decision below.

Fourth, each mental health transfer of a California prison inmate to a facility better able to meet that inmate's needs in terms of care and treatment, could

be burdened with continuing litigation initiated under the Civil Rights Act, Title 42, United States Code, section 1983. To uphold the decision below would mean invoking unnecessary adversary procedures which may well destroy, and which will, at a minimum, interfere with, the process of medical and psychiatric treatment which this transfer system is designed to provide.

SUMMARY OF ARGUMENT

The putative weight of a prisoner's private interest in avoiding being stigmatized and labeled mentally ill as a result of being placed in a mental health facility should not be considered in determining whether due process applies to a decision by correctional officials to transfer that prisoner from a correctional facility to a mental health facility when the latter institution is one within the terms of the sentence imposed upon the prisoner. Only the nature of the private interest may be considered.

Since this Court has already determined that a transfer between institutions within a state system which is contemplated by the criminal sentence imposed upon an inmate does not give rise to procedural due process rights—that was accomplished in the criminal conviction—then the nature of the prisoner's interest in being retained in a correctional institution rather than being transferred to a mental health institution must be determined from state law.

The due process clause is not implicated by an administrative transfer which does not jeopardize a per-

son's liberty or property. Specifically, a state prisoner who would impose minimum standards of due process upon this form of discretionary transfer from correctional to mental health facilities must establish that state law has conferred upon him a legal entitlement to be retained within a correctional institution, and that this right or privilege is in jeopardy as a result of the discretionary transfer of that individual from said facility.

Where state law has not conferred entitlement to such a right or privilege on an inmate in advance of the transfer proceedings, then at the time of such transfer the prisoner's interest is at best merely a hope or unilateral expectation that he might remain in a particular institution, an interest which does not rise to a constitutionally cognizable liberty interest which would mandate the attachment of due process safeguards. Likewise, neither does such a transfer, made in the exercise of discretion by authorized state officials, to an institution which is within the contemplation of the sentence imposed upon the prisoner, entail loss of a property interest.

The court below, in disregard of the decisions of this Court that due process protection extends only to liberty and property interests within the Fourteenth Amendment, equated the prisoner's interest in such a discretionary transfer between a correctional and a mental health facility with a parolee's interest at a parole revocation hearing.

The reasoning below was based upon an analysis of a Nebraska statute which analysis concluded that such

transfers were neither for administrative nor correctional purposes, but rather were conditioned upon a medical determination of mental disease or defect and the subsequent determination that the mental disease or defect could not be adequately treated within the correctional institution. The Court found that an objective expectation existed, allegedly fixed in state law and correctional practices, that such a transfer would not occur except when the existence of the defect and the inability to treat same at a correctional institution were, in that order, found to exist. Such an interpretation of the decisions of this Court, coupled with the court below emphasizing the "weight" of the loss involved in a transfer of this sort, was clearly erroneous.

The court below heavily relied upon what was clearly an *administrative* determination by Nebraska officials that the mental disease or defect, a medically and independently determined condition or status, with an existence apart from any correctional or judicial determination by state authorities, was one that "cannot be adequately treated at the penal complex". This particular form of decision is clearly of the discretionary/administrative type which this Court has previously found not to infringe any "liberty interest" of a duly convicted prison inmate.

Moreover, the very nature of the transfer proceedings negates the requirements of due process. A correctional department, a mental health department, and a prisoner all have identical interests in that all parties are striving to treat the prisoner in such a fash-

ion as will allow him to be reintroduced into society as soon as possible. The initiation of this sort of transfer proceeding is clearly not adversarial in nature, obviously being medically based. Once that catalytic information is introduced, what follows is an administrative transfer of the type which this Court has found not to require the application of due process protections.

The questions of whether, how, or under what standards and criteria the placement of a state prisoner is to be made during the term of his lawful imprisonment, particularly when such placement is made to treat a mental illness or condition, must be considered to be questions that clearly implicate executive and legislative prerogatives reserved to the states by the Tenth Amendment. The provision for and implementation of treatment-oriented, medically-necessitated, transfers involves considerations of state policy and societal interests. These include protection of society, punishment of the inmate, and the provision for the health and welfare of an inmate who has been properly placed within the care and custody of state correctional officials. All of these concerns are interests paramount to the unilateral expectations of an inmate. To construe state law to impute an intent, not otherwise clearly expressed in positive state law, to confer upon an inmate the right or privilege to placement in a particular institution throughout the entire course of his legally imposed confinement would clearly distort state law so as to favor an inmate's unilateral expectation at the expense

of state policy, societal interests, and, in this situation, possibly the inmate's own personal mental well-being as well.

Finally, even if this Court were inclined to conclude that due process should apply to such transfer proceedings, then the Court should find that only rudimentary process is necessary. Under California practice a prisoner receives notice of his Institution Classification Committee appearance for the purpose of determining whether or not his mental condition fits the criteria for transfer to a state hospital of the Department of Health, an opportunity to make a personal appearance before the committee, when feasible, to participate fully and to present his personal point of view or submit documents bearing on the proposed committee action, notice of the action taken by the committee, and a written statement of reasons for the committee's decision. If the court were to augment such procedures with the additional procedural rights required below, particularly the right of confrontation and cross-examination of the medical professionals involved in making the initial diagnosis and a requirement to provide legal counsel for the inmate at a determination which is clearly medical and administrative in nature and not an adversary proceeding, then it would clearly undermine the duly authorized and necessary powers of correctional officials, interfere with medical and psychiatric determinations and treatment and generally encumber the decision making process involved in such transfers.

A determination by this Court that due process applies would not reduce extensive federal litigation with varying results unless all the minimum requirements of due process are also specified. If due process is to apply at the time of transfer proceedings, it should be restricted to some rudimentary form far short of that necessary in a criminal trial (e.g., counsel, or confrontation and cross-examination of witnesses) or other adversary proceeding, and less also than the process due at parole revocation proceedings where the private interest at stake is far greater, and the administrative burdens are less than would accompany this form of in-prison proceeding. The procedures required in the decision below are far too complex and burdensome for the nature of the proceeding at issue; if required at all, the California procedures should be deemed to be acceptable.

ARGUMENT

I

A PERSON COMMITTED TO A STATE PRISON UPON HIS CONVICTION OF A CRIME HAS NO PROPERTY OR LIBERTY INTEREST IN CONFINEMENT IN A PARTICULAR INSTITUTION.

The decision below that process was due prison inmates when transferred from a correctional institution to a mental health institution, confinement in which was within the statutorily prescribed framework of custodial institutionalization authorized upon conviction, is completely at odds with the principles enunciated by this Court in the cases of *Meachum v.*

Fano, 427 U.S. 215 (1976) and *Montanye v. Haymes,* 427 U.S. 236 (1976). The three-judge court has clearly misinterpreted those cases by applying due process to an administratively determined, medically mandated, transfer decision never envisioned by this Court as requiring due process. The decision specifically equates an inmate's interest in remaining in a correctional institution with a parolee's interest in his conditional freedom on the streets. Upon examination and consideration of the question presented herein, the Court should find that the interest of a prisoner in such a transfer to another institution is insufficient to warrant the attachment of due process safeguards.

The Constitution of the United States does not require that every governmental impairment of some interest be conditioned on notice and an opportunity to be heard. *See Cafeteria Workers v. McElroy,* 367 U.S. 886, 894 (1961). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. (Footnote omitted.) But the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972).

In determining whether due process applies at all to an administrative transfer decision, the Court should confine itself to an appraisal of the nature of the inmate's interest, and should not consider the

weight of the interest. *Board of Regents v. Roth, supra,* 408 U.S. 564, 571 (1972).

The decision below focused upon the apparent, putative weight of the inmate's interest, concerning itself with "stigmatizing consequences" and subsequent conditions of confinement, to the near exclusion of the nature of his interest, in finding that due process applies to an administrative transfer between institutions of corrections and mental health (see Appendix A to the "Jurisdictional Statement" of the appellants). The determination that due process is applicable to a particular administrative decision is neither dependent upon, nor required by a finding of grievous loss. *Meachum v. Fano, supra,* 427 U.S. 215, 224-225 (1976); *Moody v. Daggett,* 425 U.S. 78, 88 fn. 9 (1976); *Walker v. Hughes,* 558 F.2d 1247, 1250-1251 (6th Cir. 1977).

The concept of liberty under the Fourteenth Amendment has been broadly construed so as to encompass not only freedom from physical restraint, but also the freedom to pursue and enjoy those privileges long accorded to free men. *Board of Regents v. Roth, supra,* 408 U.S. 564, 572 (1972). As a consequence of having been convicted of a crime and being committed to state prison, an inmate is necessarily subject to physical restraint, and his activities are delineated by his custodians. *See Preiser v. Rodriguez,* 411 U.S. 475, 491-492 (1973). In short, by virtue of his conviction, an inmate has forfeited freedom to be free of restraint, to do as he pleases, and to be housed where he would choose. By virtue of

his status, an inmate does not have a liberty interest in being placed in any particular institution, either within the state prison system or within a state-run mental health facility, placement within which is contemplated by state law. It is futher submitted that contrary to the reasoning of the three-judge district court, this Court has held that confinement in one institution as opposed to another cannot be equated with the conditional grant of "many of the core values of unqualified liberty . . ." *Morrissey v. Brewer,* 411 U.S. 471, 482 (1972); *cf. Marchesani v. McCune,* 531 F.2d 459 (10th Cir. 1976), *cert. denied,* 429 U.S. 846.

In addition to the "liberty" language of the Fourteenth Amendment and the analysis thereof discussed above, this Court has indicated that a due process analysis of a liberty interest parallels the accepted due process analysis of a property interest. *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974). As was held by this Court,

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and the dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board*

of Regents v. Roth, supra, 408 U.S. 564, 577 (1972); *see Wolff v. McDonnell, supra,* 418 U.S. 539, 557 (1974).

The same considerations and attitudes apply as well to the liberty interest protected by the due process clause. The essential element of these interests which makes them cognizable under the 14th Amendment is a ". . . claim of entitlement," the phrase subsequently used by the Court in *Moody v. Daggett, supra,* 429 U.S. at 88 fn. 9. As state prisoners have no independent federal constitutional or statutory right to placement or retention in a particular facility once imprisoned as the result of a conviction duly arrived at with due process protection fully accorded, the court must look to state law to determine the nature of an inmate's right, if any, at the time of his discretionary transfer from a correctional institution to an institution of the mental health department of a state. Accordingly, an inmate can have no property interest to be retained in a particular institution unless state law grants him an entitlement to be placed and retained in that particular institution.

A statutory scheme, such as California's, which is premised upon the maintenance of a variety of institutions (*see* California Penal Code section 5003), which grants correctional officials the authority to determine the institution in which a person is to be confined (*see* California Penal Code section 5068), grants these officials the authority to transfer persons from one institution to another (*see* California Penal Code section 5080), and specifically grants the Director of Corrections the authority to transfer, in his

discretion and with the concurrence of other state officials, an inmate confined in a state prison to a mental facility under the jurisdiction of the State Department of Health (*see* California Penal Code section 2684), precludes the recognition of a prisoner's property interest in being placed or retained in one particular institution. *Meachum v. Fano, supra,* 427 U.S. 215 (1976); *Montanye v. Haymes, supra,* 427 U.S. 236 (1976).

In the instant case, the "interest" which the three-judge court designated as a constitutionally protected liberty interest was in fact nothing more than the result of a judicial misinterpretation of what is and what is not a purely "administrative" determination. The "objective expectation" (*see* Appendix A, page 7, "Jurisdictional Statement,") which the three-judge court found to be a "legal entitlement" was the expectation of an inmate concerning his alleged right not to be medically found to be suffering from a mental disease or defect. This is a medical, not judicial, determination. Thereafter, the Court, out of the necessity to justify its final ruling, found that a clearly administrative determination (i.e., that such mental disease or defect could not be treated at a correctional facility in an adequate fashion), was in fact not an administrative decision. This apparent exercise in judicial contortionism was persuasive, at least in the mind of the District Court, for the decision below held that such a transfer does come within the exceptions noted in *Meachum* requiring due process where there was "some right or justifiable expectation rooted in state law that [an inmate] will

not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye v. Haymes, supra,* 427 U.S. 236, 242 (citing to *Meachum v. Fano*) (1976)). Misinterpretation of both the decisional authorities of this Court and the actual nature and effect of the challenged transfer proceedings, clearly goes against the purpose and intent of this Court's prior decisions.

The three-judge court decision concerned itself with an analysis of "grievous loss" as opposed to a proper analysis of the nature of the interest involved. In a decision which discussed just this then emerging differentiation, the Fifth Circuit Court of Appeals held, en banc, that due process protections do not attach to a parole release proceeding, stating:

> "The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protection attaches every time the government takes some action which confers a new status on the individual or denies the request for a different status." *Scarpa v. United States Board of Parole,* 477 F.2d 278, 282 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U.S. 809 (1973), *dismissed as moot,* 501 F.2d 992 (5th Cir. 1973).

As it is clear that the state government does not "confer" nor does an inmate "receive" the "cognizable benefits" of mental health, a status which exists

independent of any action by a legally enjoinable force, then due process does not attach to what is an administrative decision to respond to such a status. *See Marchesani v. McCune, supra,* 531 F.2d 459.

As state law does not extend any legal guarantee of present enjoyment of mental health, any more than it guarantees one's reputation (see *Paul v. Davis,* 424 U.S. 693, 711 (1976)), then due process does not become implicated where an inmate is transferred from one state institution to another state institution for treatment of a mental disorder.

II

THE DETERMINATION OF WHICH INSTITUTION, CORRECTIONAL OR MENTAL HEALTH, IN WHICH EACH INMATE SHOULD BE PLACED IS A MATTER OF POLICY AND INVOLVES AN EXERCISE OF JUDGMENT.

As has been recognized by this Court, "the operation of a correctional institution is at best an extraordinarily difficult undertaking." *Wolff v. McDonnell, supra,* 418 U.S. 539, 566 (1974). It was with this in mind that this Court required that before it would impose the requirement of due process procedures upon an administrative decision, it would have to be clearly demonstrated that the decision involved jeopardy of an interest, be it liberty or property, to which an inmate is legally entitled. As this Court has noted, "[t]ransfers between institutions . . . are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the

inmate." *Meachum v. Fano, supra,* 427 U.S. 215, 225 (1976). Furthermore this Court has acknowledged that the need to properly supervise state prisons, a matter of acute interest to the states, necessitates the grant of considerable latitude to prison administrators. *Meachum v. Fano, supra,* 427 U.S. 215, 229 (1976); see also *Wolff v. McDonnell, supra,* 418 U.S. 539, 563 (1974).

In a multi-institution prison system, which contains within it individuals who cannot be readily grouped into a single category either according to custody, personality, character, or mental state, these administrative concerns are brought into focus by the necessity of reaching a determination as to the most appropriate institution for each inmate. This necessitates a judgment as to the personality, character, and mental state of the inmate, an assessment of his particular needs, a determination of the institution which would best meet these needs, and an evaluation of the effect of such a placement on the level of security in an institution.

In a large prison system such as California's, the number of such decisions is a factor which cannot be ignored. Between the years 1975 and 1977 over 375 different inmates were transferred from Department of Corrections facilities into those of the Department of Health for treatment of mental conditions. The transfer of these inmates was necessary both for the welfare of the individual inmates and for the welfare and security of the institutions and personnel thereof from which they were transferred.

As can be seen by a review of the criteria according to which the California Director of Corrections exercises his discretion in making the determination of whether or not to recommend the transfer of an inmate from corrections to a facility of the Department of Health (see Appendix B), a wide variety of factors are evaluated. The choice of the most appropriate institutional placement for such an inmate's psychiatric management, custody and security needs is an involved one. In circumstances involving a particular inmate where a variety of these factors are all relevant, the determination of the appropriate institutional placement becomes more difficult and requires a balancing of the interests in rehabilitation, security, treatment of the individual, and proper administration of the prison system.

Certain needs, such as the need for psychiatric treatment, may be objectively determined by resort to a medical determination on that question. Other needs, such as the appropriate level of custody, must necessarily be based on an exercise of sound judgment and discretion. In some circumstances, the transfer determination can be made through procedures which necessarily require a certain time period for completion (see Appendix B), whereas in other circumstances an immediate decision is required. In some situations, it may be possible to clearly document, in advance, the necessity for such a transfer, whereas in other situations, prison administrators must exercise their discretion to determine whether the probability of serious difficulties or breaches of security is sufficiently high to warrant a transfer on an emergency basis.

A recognition of these factors underlies the present law within the Ninth Circuit insofar as transfers pursuant to California Penal Code section 2684 have been examined by way of federal habeas corpus proceedings. In the case of *Darey v. Sandritter,* 355 F.2d 22 (9th Cir. 1965), the court examined a petition for writ of habeas corpus filed by a California inmate subsequent to his transfer to a state hospital pursuant to California Penal Code section 2684. The inmate contended that a hearing should have been conducted prior to this transfer and alleged that prison authorities had improperly ignored a previous psychiatric report that he was not dangerous to society. In handling these allegations the Ninth Circuit stated, with regard to the inmate appellant's claim, that:

> "It is not appellant's hospitalization which deprives him of his liberty. The deprivation stems from the judgment of conviction and the sentence of confinement. The hospitalization does not result from a separate order or judgment which is independent of the penal judgment and might extend a legally imposed term of restraint. Whether a prisoner, during his lawful term, should or should not receive medical treatment in suitable environs must ordinarily be determined by custodial authorities in the proper exercise of the sound discretion. (Citations omitted)." *Darey v. Sandritter, supra,* 355 F.2d at 23; see also, *Haughey v. Rhay,* 300 F.Supp. 490, 495 (D.C.E.D. Wash. 1969); cf. *Stiltner v. Rhay,* 371 F.2d 420, 421 (9th Cir. 1967), *cert. den.* 387 U.S. 925, *rehrg. den.* 389 U.S. 964.

The establishment and implementation of this transfer procedure is an exercise of the legislative

and executive prerogatives reserved to the states under the Tenth Amendment to the United States Constitution, as it clearly involves "discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano, supra,* 427 U.S. at 225. In fashioning such a process, state governments take into account state policy and societal interests. In the absence of a positive state law conferring upon inmates a claim of entitlement to absolute retention in a correctional rather than a mental health facility during the term of their institutionalization pursuant to a valid criminal conviction, it would not be proper for federal courts to apply the due process clause of the Fourteenth Amendment to override an exercise of discretion involving a legitimate state interest under the Tenth Amendment.

To uphold the determination below, which, despite expressions of legislative intent granting the director of corrections discretionary authority to retain or transfer an inmate under his custody, held that state law nonetheless somehow grants inmates entitlement to retention in a particular institution or type of institution, would be tantamount to direct federal supervision of the exercise of the prerogatives expressly reserved to the states under the Tenth Amendment.

In summary, determining the appropriate institution in which each inmate is to be placed, particularly those inmates suffering from a mental disease or defect as is the case herein, is a complex and difficult task. It is an area wherein the experience, knowledge,

and judgment of the correctional officials who are charged with responsibility for the welfare and security of the inmate is indispensable. As such the development of standards and procedures by which that discretionary authority should be exercised must remain with correctional authorities.

III

IF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT APPLIES TO TRANSFER PROCEEDINGS BETWEEN CORRECTIONAL INSTITUTIONS AND MENTAL HEALTH INSTITUTIONS, ONLY RUDIMENTARY PROCEDURES ARE NECESSARY.

If this Court determines that due process applies to this particular form of administrative decision, there remains a question of how much process is due. *Morrissey v. Brewer, supra,* at 481; *Wolff v. McDonnell, supra; Gagnon v. Scarpelli,* 411 U.S. 778 (1976). Due process only mandates such procedural safeguards as the particular situation demands. See *Morrissey, supra* at 481. Due process is a flexible concept which varies with different contexts, depending upon several factors, especially "the nature of the alleged right involved, the nature of the proceeding, and the possible burden of that proceeding." *Hannah v. Larche,* 363 U.S. 420, 422 (1960); *Matthews v. Eldridge,* 424 U.S. 319 (1976). If due process does apply to this particular form of proceeding, then in order to lessen the administrative burden associated with such procedures, there would have to be a "mutual accommodation" between the needs and objectives of a Department of Corrections and any liberty or property interest of an inmate. *Wolff v. McDonnell, supra* at 556. In view of what should be the non-adversarial nature of such a proceeding, California would urge that the procedures such as it now employs are more than sufficient to safeguard and probably more than are necessary to protect any cognizable liberty or property interest.

The present departmental procedures reflect development by California of its internal administrative decision-making process. This development has taken into account both the needs of the prisoner and those of the prison system and is the result of calculated experimentation as well as day-to-day experience. Any application of additional procedural protection would unnecessarily encumber and make more difficult the decision-making process which in California, for example, involves three state agencies. Furthermore, it would cast the entire process into one of an adversary nature, particularly if this Court were to agree with the three-judge court below in requiring counsel at all such proceedings, something which this Court refused to require in its decisions in *Morrissey v. Brewer, supra; Gagnon v. Scarpelli, supra;* and *Wolff v. McDonnell, supra.* If this full range of process was required then the administrative burden could well become overpowering.

The full spectrum of procedural protection that the three-judge court would impose would generate hostility and antagonism between the prisoner and prison officials at an obviously delicate stage in the prisoner's

confinement, and possibly hinder his rehabilitation and recovery from any mental condition that might exist. Such a situation would clearly be to the detriment of all parties and would be the very form of "great unwisdom" which this Court rejected as being "an inflexible constitutional straitjacket" in the *Wolff* decision. *Wolff v. McDonnell, supra* at 563. To do what the court below requires would find the judiciary entangling itself in discretionary matters that are within the expertise of correctional authorities (see *Meachum v. Fano, supra* at 229) and supervising the daily functions of correctional authorities, a result which would be directly contrary to previous holdings of this Court (See *Cruz v. Beto,* 405 U.S. 319, 321 (1972); *Jones v. North Carolina Prisoners Labor Union, Inc.,* ..... U.S. ....., 97 Sup.Ct. 2532, 2538 (1977); *Procunier v. Martinez,* 416 U.S. 396, 404-405 (1974)).

Accordingly, it is submitted that "[t]he better course at this time, in a period when prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell, supra* at 569.

For all of the above reasons, we submit that should this Court determine that the due process clause of the Fourteenth Amendment to the United States Constitution is and should be applicable at state correctional administrative determinations concerning transfers of inmates with mental disease or defects from correctional institutions to mental health facilities, then the development of such procedures and

standards should remain with the officials of the state prisons.

CONCLUSION

The judgment of the three-judge district court should be reversed and the matter should be remanded with directions that the action be dismissed because the due process clause of the Fourteenth Amendment of the United States Constitution is not implicated by state administrative transfer proceedings of inmates between correctional and mental health facilities when inmate placement in the latter is within the contemplation of the sentence imposed by conviction under the laws of the state.

Dated, March 17, 1978.

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
JOHN T. MURPHY,
Deputy Attorney General,
KARL S. MAYER,
Deputy Attorney General,
THOMAS P. DOVE,
Deputy Attorney General,
Attorneys for the State of California as Amicus Curiae.

(Appendices Follow)

Appendices

Appendix A

PENAL CODE OF THE STATE OF CALIFORNIA

§ 2684. Transfer to state hospital; duration of treatment

Text of section operative until July 1, 1978.

If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Health, the Director of Corrections, with the approval of the Community Release Board for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the Director of Health who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the Director of Health so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital.

(Added by Stats.1941, c. 106, § 15. Amended by Stats. 1953, c. 1666, § 10; Stats.1965, c. 483, § 1; Stats.1977, c. 165, § 32.)

For text of section operative July 1, 1978, see § 2684, post.

§ 2684. Transfer to state hospital; duration of treatment

Text of section operative July 1, 1978.

If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Community Release Board for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the Director of Health so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital.

§ 2685. Receipt of prisoner; administrative procedure; return to prison; time of hospitalization as part of sentence

Upon the receipt of a prisoner, as herein provided, the superintendent of the state hospital shall notify the Director of Corrections of that fact, giving his name, the date, the prison from which he was received, and from whose hands he was received. When in the opinion of the superintendent the mentally ill, mentally deficient or insane prisoner has been treated to such an extent that such person will not benefit by further care and treatment in the state hospital, the superintendent shall immediately notify the Director of Corrections of that fact. The Director of Corrections shall immediately send for, take and receive the prisoner back into prison. The time passed at the state hospital shall count as part of the prisoner's sentence.

Appendix B

INMATE CLASSIFICATION MANUAL OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS

Transfer of Prisoners to the State Department of Health

Chapter 12 Article 1

Article 1—Prisoners Who May be Transferred

Sec. 1200. *Authorization.* Section 2684 of the California Penal Code provides for transfer of mentally ill, mentally deficient or insane prisoners to the Department of Health if in the opinion of the Director of Corrections rehabilitation may be expedited by treatment at any one of the state hospitals under the jurisdiction of the Department of Health.

Sec. 1201. *Criteria.* To be transferred to the state hospitals of the Department of Health inmate patients should:

(a) Have a psychiatric condition requiring care and treatment not available in the Department of Corrections but available in state hospitals; or

(b) Have a deteriorating psychiatric condition which can be slowed, stabilized or improved through care and treatment available in a state hospital;

(c) Be controllable within the hospital's security system;

(d) Have potential for achieving one of the benefits of (a) or (b) above within approximately six months.

Sec. 1202. *Procedure.* (a) Recommendations for transfer will be processed by the institutional classification committee for approval by the Chief Medical Officer and will contain the following information:

(1) A psychiatric evaluation made within the past three months.

(2) Psychiatric history.

(3) Social and family history.

(4) Arrest and conviction history.

(5) History of institutional behavior in the criminal justice system.

(6) Summary of psychiatric treatment given within the Department of Corrections, and effect.

(7) Objectives expected to be met by transfer and the criteria for return to CDC or placement.

(b) If approved by the Chief Medical Officer, the inmate's name and number will be listed on CDC Form 242, Transfer Order, and forwarded with a copy of CDC 128-G, Classification chrono, a copy of an up-to-date cumulative case summary including the latest psychiatric report and a copy of Form MH 1746, PC 2684 Transfer Information Form and sent to the Chief, Classification Services for review.

(c) Upon approval by classification staff of inmate(s) listed on CDC Form 242, the transfer order will be routed to:

(1) The Adult Authority or the Women's Board of Terms and Parole for approval.

(2) The Chief, Medical Services for certification.

(3) The Director of Health for authorization.

(4) The Director and/or Deputy Director-Institutions for signing of the transfer order.

Sec. 1203. *Emergency Cases.* In emergency cases, telephone approval for immediate transfer of seriously disturbed female inmates may be obtained from the Women's Board of Terms and Parole. Telephone or teletype request should then be made to the Director of Corrections. The Chief of Medical Services and the Chief, Classification Services are authorized to approve such transfers for the Director of Corrections after obtaining authorization from the Director of Health.

Sec. 1204. *Hub Institutions.* (a) The following institutions are designated as "Hub Institutions" to provide services for California Department of Corrections male felons housed in Department of Health facilities:

(1) California Medical Facility—
Napa State Hospital.

(2) California Mens Colony—
Atascadero State Hospital.

(3) California Institution for Men—
Patton State Hospital.

(b) Records for each man housed by the Department of Health will be kept by the respective "Hub Institutions." The hub institution will also be responsible for all contacts with the specified Department of Health facility, including securing reports, scheduling for Adult Authority consideration, and California Department of Corrections parole and discharge procedures.

Sec. 1205. *Records.* The following records shall accompany each inmate transferred from the Department of Corrections to the Department of Health: (a) A letter from the warden/superintendent which includes sentencing information, date of arrival, offense, board actions and release date. Attached to this letter will be a copy of CDC Form 242, Transfer Order, a recent psychiatric report, a list of visitors and correspondents, a summary of recent conduct if not included in the cumulative case summary. This material will be retained at the state hospital.

(b) The medical and psychiatric files together with the inmate central file after removal of the commitment, CDC Form 112, Summary of Sentence Data, the master copy, and extra copies of the cumulative case summary.

(c) Items in (b) above are to be returned to the Hub Institution within 60 days after inmate is received in the Department of Health. The transferring institution will clearly label the material to assure return to proper hub institution and request the material be returned within 60 days.

(d) The superintendent of the state hospital will be contacted by the warden/superintendent prior to making a transfer in order that satisfactory arrangements may be made for delivery.

Sec. 1206. *Progress Reports on Prisoners in State Hospitals.* (a) Ninety days prior to the scheduled calendar appearance of an inmate who has been transferred to a state hospital, a request for a current progress report will be forwarded to the appropriate hospital superintendent.

(b) Once each year, 90 days prior to the anniversary of the date of transfer of condemned prisoners or prisoners not scheduled for annual calendar appearance, a similar request will be forwarded to the appropriate hospital superintendent.

(c) Two copies of CDC Form 280, Department of Health Progress Report, pre-printed master sets and two blank master sets will be forwarded with each request to a hospital superintendent for a progress report. The letter of request will ask that the progress report be typed on the master sets.

(d) Department of Health progress reports for inmates appearing on calendars will be duplicated and presented for review by the Adult Authority. Department of Health progress reports on cases not scheduled for regular calendar appearances will be duplicated and added to the cumulative case summary after review by the appropriate institutional staff. One copy of this report will be forwarded to the Director of Corrections for retention in the central office inmate file. Department of Health progress reports on condemned cases will be duplicated and added to the cumulative case summary after review by the appropriate institutional staff. Three copies of this report will be forwarded to the Director of Corrections in

the same manner as other reports on condemned prisoners.

Sec. 1207. *Return of Prisoners to CDC.* Section 2685 of the Penal Code makes provisions for the return of prisoners from state hospitals.

(a) When in the opinion of the superintendent, the mentally ill, mentally deficient or insane prisoner has been treated to such an extent that such person will not benefit by further care and treatment in the state hospital, he shall immediately notify the Director of Corrections to that effect.

(b) Procedures to Follow:

(1) The Director of Health forwards a letter to the Director of Corrections requesting the return of the prisoner to a Department of Corrections facility.

(2) This request is sent to the Chief, Classification Services for logging in a control file.

(3) The request, with progress reports and any other pertinent information is forwarded to the Assistant Superintendent, Psychiatric Services at the California Medical Facility for review and recommendations as to which facility the prisoner should be returned. His recommendation is returned to the Chief of Classification Services.

(4) The departmental transportation officer will be notified, by the Chief Classification Services, to arrange the return of the prisoner to the designated Department of Corrections facility.

Sec. 1208. *Discharge of Mentally Disordered Persons.* Before discharging any person who is a danger to others as a result of mental disorder, the Director of Corrections may place, or caused to be placed upon reasonable cause, the person in a facility designated by a county and approved by the Department of Health as a facility for 72-hour treatment and evaluation or in a 14-day intensive treatment facility pursuant to the Lanterman-Petris-Short Act. (See Penal Code Section 2960 as approved by 1970 legislature.)

Article 3—Classification Committees: General Considerations

Sec. 404. *General Procedures.* (a) The committee will use the central file, information presented by the inmate, and any pertinent reports available.

(b) The inmate will make a personal appearance before the committee when feasible to participate fully and present a personal point of view or submit documents bearing on the proposed committee action. The reasons for any non-appearance will be documented.

(c) A CDC Form 128-G will be prepared and a copy given to the inmate in conformance with casework information validity and confidentiality procedures.

(d) Committee decisions will be reached through group discussion and agreement. Subcommittees will refer cases in which agreement cannot be reached to the next higher committee.

(e) The committee is to notify the inmate and relevant institution personnel of actions taken.

(f) The warden/superintendent can defer actions of the committee if the safety of the institution requires this.